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Dillon Companies, Inc. and United Food & Commercial Workers, District Union Local Two, AFL-CIO. Case 17-CA-20718

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND
LIEBMAN

Pursuant to a charge filed on June 12, 2000, the General Counsel of the National Labor Relations Board issued a complaint on June 29, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 17-RC-11664. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On July 21, 2000, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On July 25, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and the General Counsel filed a reply thereto.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We note that in response to the General Counsel's Motion for Summary Judgment, the Respondent requested the Board to reopen the record in the underlying representation case (Case 17-RC-11664) based on evidence which the Respondent contends was taken in another unfair labor practice case involving the Respondent (Case 17-CA-20113). That request was denied by the Board by Order dated September 19, 2000. The alleged "evidence" was no more than a rejected offer of proof in an unrelated

unfair labor practice case that allegedly contradicted the testimony that the witness had earlier given in the representation proceeding. Because the witness was available to the Respondent in the representation proceeding, we did not consider the information that the Respondent elicited from the witness for the purpose of its offer of proof to be newly discovered or previously unavailable evidence. Nor did we consider a rejected offer of proof, which was subject neither to objection nor cross-examination, to be sufficiently probative to warrant reopening the hearing.¹ We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Kansas corporation, has been engaged in the operation of retail grocery stores at various locations, including retail grocery stores located at 588 East Santa Fe, Olathe, Kansas and 16665 151st Street, Olathe, Kansas (the Respondent's facilities).

During the 12-month period ending June 30, 2000, the Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000 and purchased and received at its facilities products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Kansas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held October 27, 1998, the Union was certified on March 9, 2000, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time meat department employees, including the meat department managers employed by Respondent at Store No. 59, located at 588 East Santa Fe, Olathe, Kansas; and Store No. 69, located at 16665 151st Street, Olathe, Kansas, excluding clerks, courtesy clerks, office clerical employees, seafood department employees, delicatessen employees

¹ We hereby correct our September 19, 2000 Order to the extent that it mistakenly stated that the Respondent never sought to appeal the judge's rejection of its offer of proof prior to the settlement of the unrelated unfair labor practice case. That mistaken finding was not necessary to the result.

and professional employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about March 15, 2000, and on or about April 3, 2000, by letter, and on or about June 7, 2000, in a telephone call, the Union requested that the Respondent bargain, and, since March 15, 2000, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 15, 2000, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Dillon Companies, Inc., Olathe, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food & Commercial Workers, District Union Local Two, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if

an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time meat department employees, including the meat department managers employed by Respondent at Store No. 59, located at 588 East Santa Fe, Olathe, Kansas; and Store No. 69, located at 16665 151st Street, Olathe, Kansas, excluding clerks, courtesy clerks, office clerical employees, seafood department employees, delicatessen employees and professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at Stores 59 and 69 in Olathe, Kansas, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 17 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former unit employees employed by the Respondent at any time since March 15, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2000

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food & Commercial Workers District Union Local Two, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time meat department employees, including the meat department managers employed by us at Store No. 59, located at 588 East Santa Fe, Olathe, Kansas; and Store No. 69, located at 16665 151st Street, Olathe, Kansas, excluding clerks, courtesy clerks, office clerical employees, seafood department employees, delicatessen employees and professional employees, guards and supervisors as defined in the Act, and all other employees.

DILLON COMPANIES, INC.